

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ALAN FLONNES,

Plaintiff,

v.

PROPERTY & CASUALTY INSURANCE  
COMPANY OF HARTFORD,

Defendant.

Case No. 2:12-cv-01065-APG-CWH

**ORDER GRANTING  
RECONSIDERATION AND DENYING  
LEAVE TO AMEND**

**I. BACKGROUND**

Alan Flonnes ("Flonnes") brought claims against Property & Casualty Insurance Company of Hartford ("Hartford") for (i) breach of contract; (ii) unfair claims practices in violation of NRS 686A.310; and (iii) breach of the implied covenant of good faith and fair dealing (the "implied covenant" or "bad faith" claim). (Dkt. No. 1.) In October 2012, the court dismissed *with prejudice* the unfair practices and implied covenant claims, allowing only the breach of contract claim to proceed. (the "Prior Order," Dkt. No. 13.) The Prior Order also denied leave to amend because the first proposed amended complaint (the "First PAC," Dkt. No. 9, Ex. 1) was futile as not alleging sufficient facts to comply with the Rule 8 pleading standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). (Dkt. No. 13.)

On March 27, 2013, Flonnes filed his "Motion for Reconsideration of Order Denying Counter-Motion to Amend Complaint" (the "Motion"). (Dkt. No. 22.) Attached to the Motion

1 were an “expert opinion letter” by Dennis M. Prince, Esq. (the “Prince Report”), which purports  
2 to provide a “comprehensive claim handling analysis” for Flonnes’ insurance claim, and a second  
3 proposed amended complaint (the “Second PAC”). (*Id.*) The court treats the Motion as  
4 requesting both reconsideration of the Prior Order and leave to amend the Complaint. Hartford  
5 responded on April 15 and Flonnes replied on April 25. (Dkt. Nos. 41, 50.) The court heard oral  
6 argument on the Motion on June 12.

7 Flonnes seeks reconsideration under Rule 54(b) and under the court’s inherent power to  
8 reconsider, set aside, and amend interlocutory orders. He contends that the court committed legal  
9 error when it dismissed the Second and Third Claims with prejudice. He then argues that new  
10 evidence obtained in discovery justifies leave to amend the Complaint to revive the Second and  
11 Third Claims. Hartford responds that Flonnes has had the allegedly new evidence since this  
12 case’s inception, and the Second PAC still contains only generalized assertions that are  
13 insufficient to revive the Second and Third Claims under *Iqbal* and *Twombly*. Hartford also  
14 contests the timeliness of the Motion because the court-approved discovery plan specified  
15 February 19, 2013 as the deadline for motions to amend pleadings. (Dkt. No. 16.)

## 16 **II. ANALYSIS**

### 17 **A. Reconsideration**

#### 18 **1. Legal Standard**

19 The district court’s discretion to reopen or reconsider an order is governed by the law-of-  
20 the-case doctrine. *W. Birkenfeld Trust v. Bailey*, 837 F. Supp. 1083, 1085 (E.D. Wash. 1983).  
21 Three exceptions to this doctrine permit the court to alter its prior decision, as long as the court  
22 has not been divested of jurisdiction over the matter: “(1) the decision is clearly erroneous and its  
23 enforcement would work a manifest injustice, (2) intervening controlling authority makes  
24 reconsideration appropriate, or (3) substantially different evidence” has surfaced that was not  
25 previously obtainable in the exercise of due diligence. *Reed v. Town of Gilbert, Ariz.*, 707 F.3d  
26 1057, 1067 n.9 (9th Cir. 2013); *U.S. v. Matthews*, 643 F.3d 9, 14 (1st Cir. 2011).

1 A complaint or individual claim should be dismissed without leave to amend only when  
 2 “it is clear . . . that the complaint could not be saved by amendment.” *Steckman v. Hart Brewing,*  
 3 *Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

## 4 **2. Application**

5 The court issued the Prior Order when discovery was barely underway. The unfair  
 6 practices and bad faith claims were dismissed *with prejudice* for failure to plead sufficient facts to  
 7 support plausible claims for relief. Dismissal with prejudice was premature, however. It is  
 8 possible that these claims could be saved by amendment at some point (that is, they are not barred  
 9 as a matter of law). Dismissal with prejudice was legal error and worked a manifest injustice by  
 10 barring claims that may be salvageable upon the discovery of relevant facts giving rise to such  
 11 claims. Upon reconsideration, under Rule 54(b), the court orders the Prior Order revised such  
 12 that the Second and Third Claims were dismissed *without* prejudice. The next issue is whether  
 13 leave to amend should be granted under Rule 15 such that the Second PAC becomes the operative  
 14 complaint.

## 15 **B. Leave to Amend**

### 16 **1. Rule 15**

17 In relevant part, Rule 15 provides that “a party may amend its pleading only with . . . the  
 18 court’s leave. The court should freely give leave when justice so requires.” FED. R. CIV. P.  
 19 15(a)(2). Rule 15’s policy of favoring amendments should be applied with “extreme liberality.”  
 20 *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Several factors guide the court’s discretion in  
 21 determining whether to grant leave to amend: bad faith, undue delay, prejudice to the opposing  
 22 party, futility of the amendment, and whether the plaintiff has previously amended the complaint.  
 23 *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (internal  
 24 quotation marks and citation omitted); *Waldrip v. Hall*, 548 F.3d 729, 732 (9th Cir. 2008).

25 A party’s undue delay in moving for leave to amend may be excused if there is new  
 26 evidence to support the amended pleading. *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 609 F.  
 27 Supp. 2d 1090, 1093 (E.D. Cal. 2009); *see Buel v. City & Cnty. of San Francisco*, 166 F. App’x  
 28

901, 903 (9th Cir. 2006). Conversely, the court will not grant leave to amend if the allegedly new evidence was available or reasonably obtainable with due diligence at an earlier time.

Although the court should assess all the factors, they are not equally weighted. The court may deny leave to amend on the sole basis that the “proffered amendments would be nothing more than an exercise in futility.” *Bonin*, 59 F.3d at 845. Amendment of a complaint is futile if the complaint as amended fails to meet the pleading requirements of Rule 8.

## 2. Rule 8 Pleading Standard — *Iqbal* and *Twombly*

District courts must apply a two-step approach when considering the pleading standards of Rule 8 and motions to dismiss under Rule 12(b)(6). *Iqbal*, 556 U.S. at 679. The same approach applies when considering a proposed amended complaint. *See Sonoma Cnty. Ass’n of Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117–18 (9th Cir. 2013). First, the court must accept as true all well-pleaded factual allegations; legal conclusions, however, are not entitled to the same assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 663. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has “alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks and citation omitted). When the claims have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

## 3. Unfair Claims Practices — NEV. REV. STAT. § 686A.310

In the Second PAC, Flonnes asserts claims under NRS 686A.310(1)(e) and (n):

[1] Engaging in any of the following activities is considered to be an unfair practice: . . .

(e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear. . . .

\* \* \*

1 (n) Failing to provide promptly to an insured a reasonable explanation of the  
2 basis in the insurance policy, with respect to the facts of the insured's claim  
3 and the applicable law, for the denial of the claim or for an offer to settle or  
compromise the claim.

4 NEV. REV. STAT. § 686A.310(1)(e), (n) (2011).

5 The Prior Order dismissed this claim because the Complaint and First PAC set forth only  
6 general, conclusory allegations. The Second PAC includes new allegations, including details of  
7 Flonnes' injuries and his doctors' qualifications. Flonnes alleges that Hartford has possession of  
8 all of his medical records, and that despite unequivocal evidence of his chronic medical  
9 conditions, Hartford unfairly and improperly evaluated his claim.

10 With regard to NRS 686A.310(1)(e), Flonnes argues that liability was reasonably clear  
11 when Hartford took possession of his medical records. He alleges that Hartford was aware that  
12 (i) medical costs to reach his pre-accident condition will exceed \$100,000; (ii) his current medical  
13 costs are approximately \$35,000; and (iii) similar claims have been resolved for over \$300,000.  
14 Flonnes fails to explain, however, when Hartford became aware of these cost-related facts or  
15 when Hartford acquired his medical records. No explanation is offered as to why the factual  
16 allegations were not made earlier. Flonnes contends that more factual support will be available  
17 once Hartford's claims file is produced, but that that does not explain why the facts currently  
18 alleged could not have been pled sooner.

19 As to NRS 686A.310(1)(n), Flonnes argues that Hartford has failed to provide a  
20 reasonable explanation for its decision, despite overwhelming medical evidence demonstrating  
21 the severity of his injuries and his need for continuing care. He also argues that Hartford has  
22 failed to explain how it valued his claim at approximately \$110,000 (which Hartford has now  
23 done in its discovery responses). Flonnes does not explain, however, when the evidence of his  
24 medical conditions became available to him and/or was made available to Hartford.  
25 Consequently, the court cannot determine whether this information is truly new or not.

26 In addition to the timeliness problem, the unfair practices claim as pled in the Second  
27 PAC does not withstand analysis under *Iqbal* and *Twombly*. Regarding NRS 686A.310(1)(e),  
28 Flonnes' assertion that the medical costs will certainly exceed \$100,000 is speculative, and there

are no facts to connect Flonnes' case with the "similar" cases that were settled for over \$300,000. Even if this evidence were truly new, it would not support a reasonable inference that Hartford's proposed settlement for approximately \$10,000 (above the \$100,000 from the tortfeasor's insurer) was not prompt, fair, or equitable. *See Iqbal*, 556 U.S. at 663. As to 686A.310(1)(n), the Second PAC merely recites the elements of this claim—namely, that Hartford failed to provide a reasonable explanation. This allegation is not supported with facts upon which the court could reasonably infer that Hartford violated NRS 686A.310(1)(n). *See id.*

In sum, Flonnes has failed to demonstrate that the facts supporting the new allegations in the Second PAC were unavailable or not reasonably obtainable with due diligence earlier (i.e., when Flonnes filed the First PAC). Furthermore, amendment would be futile, as the unfair practices claim in the Second PAC does not meet the Rule 8 standard set forth in *Iqbal* and *Twombly*. Accordingly, the court denies leave to amend the Complaint to revive the unfair practices claim.

#### 4. Implied Covenant of Good Faith and Fair Dealing

Under Nevada law, "[b]ad faith is the absence of a reasonable basis for denying benefits . . . and the defendant's knowledge or reckless disregard for the lack of a reasonable basis for denying the claim." *Pioneer Chlor Alkali Co., Inc. v. Nat'l Fire Ins. Co. of Pittsburgh, Pa.*, 863 F. Supp. 1237, 1242 (D. Nev. 1994). More succinctly, "[b]ad faith is established where the insurer acts unreasonably and with knowledge there is no reasonable basis for its conduct." *Guar. Nat'l Ins. Co. v. Potter*, 912 P.2d 267, 272 (Nev. 1996). Thus, a bad faith claim has both an objective element and a subjective element. The Prior Order denied leave to amend because the First PAC put forth no facts to support the subjective element: that Hartford knew or recklessly disregarded that it had no reasonable basis to deny Flonnes' claim.

The Second PAC asserts that the subjective element of bad faith is shown by Hartford's possession of Flonnes' medical records/bills and its awareness of cases with similar injuries settling for more than \$300,000. Flonnes contends in his Reply that he obtained "unequivocal" evidence of Hartford's bad faith only when Hartford provided its initial disclosures and responded to his written discovery. Specifically, based on Hartford's responses to interrogatories, Flonnes

1 alleges that Hartford ignored the opinions of his two treating medical providers and denied the  
2 maximum policy limits at the sole direction of two insurance adjusters with no medical training.

3 A decision based solely on the opinions of non-medical experts in light of Flonnes'  
4 substantial medical records and treatment history might reasonably imply reckless disregard for  
5 the lack of a reasonable basis to deny a claim for medical costs. But the court's inquiry does not  
6 stop at the initial denial of Flonnes' insurance claim. Hartford later retained Derek Duke, M.D. to  
7 perform a records review. In light of Hartford's hiring of a medical expert to review and affirm  
8 the findings of its adjusters, the court cannot reasonably infer the subjective element of bad faith.  
9 Flonnes' reliance on the Prince Report is unconvincing. Mr. Prince is not a medical expert and is  
10 not in a position to determine whether Hartford's processes were fair or unbiased. The Prince  
11 Report is also problematic in that it does not state whether its conclusions are based on evidence  
12 available before discovery or only during discovery.

13 Moreover, Flonnes cites no legal authority for his propositions that an insurer must  
14 (i) perform an *independent* investigation or medical review; and (ii) perform an *in-person* medical  
15 exam of the insured. At the hearing, Flonnes' cited two cases to support his assertion that an  
16 insurer must give *equal* consideration to its own medical records/reports and to an insured's  
17 medical records/reports, but those two cases are inapposite.

18 In *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 322 (Nev. 2009), the Nevada Supreme Court  
19 held that an insurer must give "equal consideration to the insured's interest." But this statement  
20 was made in the context of that court's holding that the implied covenant of good faith and fair  
21 dealing obligates insurers to adequately inform insureds of settlement offers; medical data were  
22 not at issue. *Id.* This "equal consideration" does not reasonably extend to the insurer's  
23 consideration of the insurer's and the insured's competing medical data.

24 In *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251 (9th Cir. 1991), the Ninth Circuit  
25 analyzed a bad faith claim under Arizona law. One of the factors to determine liability was  
26 whether the insurer properly investigated the claim. *Id.* at 254. The court upheld the bad faith  
27 judgment, largely because the insurer "never thoroughly investigated the [car] accident," deposed  
28 only the insured, and hired an accident reconstructionist only once the insured's assets were at



1 stake in the bad faith suit. *Id.* The circuit court did not discuss the insurer's duty to weigh  
2 medical evidence provided by the insured. *Id.*

3 As there appears to be no legal basis for the particular duties Flonnes' purports to impose  
4 on Hartford concerning the review of his medical data, and the non-conclusory, factual  
5 allegations in the Second PAC supporting the subjective element of bad faith do not rise to the  
6 level of plausibility required under Rule 8, the court denies leave to amend the Complaint to  
7 revive the bad faith claim.

### 8 **III. CONCLUSION**

9 The court grants in part and denies in part the Motion. The court grants reconsideration  
10 because the Prior Order's dismissal of the Second and Third Claims with prejudice was an error  
11 of law and worked a manifest injustice against Flonnes. The court denies leave to amend because  
12 Flonnes did not sufficiently explain why the facts supporting the new allegations in the Second  
13 PAC were not previously available or reasonably obtainable with due diligence at the relevant  
14 earlier time, and because the Second PAC does not meet the Rule 8 pleading standard under *Iqbal*  
15 and *Twombly*.

16 Accordingly, the court hereby ORDERS:

- 17 1. The Prior Order (Dkt. No. 13) is revised under Rule 54(b) such that the Second and  
18 Third Claims (unfair claims practices and bad faith) were dismissed *without* prejudice.  
19 2. Leave to amend under Rule 15 is denied *without* prejudice.<sup>1</sup>

20 DATED this 17<sup>th</sup> day of June, 2013.

21   
22 \_\_\_\_\_  
23 ANDREW P. GORDON  
24 UNITED STATES DISTRICT JUDGE  
25  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Magistrate Judge Hoffman's Order compelling production of Hartford's entire claims  
file (Dkt. No. 66) remains in effect. This Order does not alter in any way Hartford's obligation to  
comply with that Order.